

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 017266-02**

Brian D. Weisner  
American Architectural Iron  
National Union Fire

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Fabricant, Koziol and Harpin)

This case was heard by Administrative Judge Maher.

**APPEARANCES**

William R. Reitzell, Esq., for the employee  
Thomas G. Bradley, Esq., for the insurer

**FABRICANT, J.** The employee appeals a decision denying his claim for the maximum penalty pursuant to G. L. c. 152, § 8(1).<sup>1</sup> The employee had asserted the insurer failed to comply with a § 10A conference order to reimburse him for payment of certain prescription medications. The judge found the employee did not follow the proper filing procedure to perfect his claim pursuant to 452 CMR § 1.07(2)(b).<sup>2</sup> For reasons discussed below, we reverse the decision.

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<sup>1</sup> General Laws c. 152, § 8(1), provides, in relevant part:

Any failure of an insurer to make all payments due an employee under the terms of an order, decision, arbitrator's decision, approved lump sum or other agreement. . . within fourteen days of the insurer's receipt of such document, shall result in a penalty of two hundred dollars, payable to the employee to whom such payments were required to be paid by the said document; provided, however, that such penalty shall be one thousand dollars if all such payments have not been made within forty-five days, two thousand five hundred dollars if not made within sixty days, and ten thousand dollars if not made within ninety days.

<sup>2</sup> 452 Code Mass. Regs. § 1.07(2)(b) states:

We recount only the facts necessary to discuss the employee's issues. The employee's claim arises out of the insurer's failure to make all payments due under the terms of a March 16, 2016, § 10A conference order awarding the reimbursement of §§13 and 30 prescription medications.<sup>3</sup> The insurer filed a timely appeal, and the case was scheduled for hearing *de novo*. (Dec. 2.)

On June 7, 2016, prior to the scheduled date of hearing, the employee filed a claim for penalties pursuant to § 8(1), with a request that it be joined at hearing.<sup>4</sup> The employee concedes that the claim did not meet the requirements of 452 CMR § 1.07(2)(b). Specifically, it was not accompanied by an affidavit setting forth the date the payment was due, when any payment was made, and the amount of the penalty owed. (Employee br. 2.) At hearing, the judge allowed the employee's motion to join the § 8(1) penalty claim.

On April 25, 2017, after the close of evidence, but before the issuance of the hearing decision, the insurer paid the reimbursement of prescription expenses previously ordered at conference.<sup>5</sup> The judge made the following ruling of law:

The insurer did not make all of the ordered reimbursements. Therefore they are technically in violation of the Statute and could be responsible to pay the

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Pursuant to the provisions of G.L. c. 152, § 7G, the following documentation must be attached to a claim for benefits or complaint for modification or discontinuance of benefits before it will be processed by the Office of Claims Administration:  
(b) Claims for penalties under G.L. c. 152, § 8(1) shall be accompanied by a copy of the order, decision, arbitrator's decision, approved lump-sum or other agreement or other relevant document(s) with which it is alleged the insurer has failed to comply, together with an affidavit signed by the claimant or the claimant's attorney attesting to the date payment was due, the date, if any, on which payment was made, and the amount of the penalty the claimant is owed.

<sup>3</sup> Despite the order of payment, the insurer only elected to reimburse the employee for payments he made for OxyContin, but not for three other medications: Pristiq, Trazadone and Zolpidem. (Dec. 7.)

<sup>4</sup> Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

<sup>5</sup> Rizzo, *supra*.

employee a Section 8 penalty. . . .

It is my determination, despite the insurer's failure to pay the order, the employee did not follow the requirements of 452 Code of Mass Regulations Section 1.07(2)(b) that provides "claims for penalties under M. G. L. c. 152 [§] 8(1) shall be accompanied by a copy of the order..., together with an affidavit signed by the claimant's attorney attesting to the date payment was due,...the amount of the penalty the claimant is owed." The employee's claim for a penalty fails for not following proper procedure for filing such claim.

(Dec. 7-8.)

The hearing decision was appealed by the employee on the § 8(1) penalty issue, and a new claim was also filed meeting the requirements of 452 CMR 1.07(2)(b). A § 10A conference was scheduled for August 28, 2017, but was stayed by agreement of the parties pending the decision of the board.<sup>6</sup>

On appeal, the employee argues that he essentially complied with the requirements of 452 CMR 1.07(2)(b), as the initial claim for § 8(1) penalties was admitted directly into the hearing record, and was not processed by the Office of Claims Administration for scheduling. Further, because the employee testified as to the prescription details and the amounts owed, he argues that compliance with the affidavit requirement of 452 CMR 1.07(2)(b) was effectively met, and therefore, penalties pursuant to § 8(1) should have been awarded. (Employee br. 5, Ex. #5, Dec. 2.) We agree.

In Favata v. Atlas Oil Co., 12 Mass. Workers' Comp. Rep. 12, 14 (1998), we held that failure to timely pay interest under a conference order may trigger a penalty under § 8(1) because § 50 interest is "payment[] due the employee." Similarly, reimbursement of out-of-pocket payments for prescription medications awarded as a result of a conference order is payment due an employee pursuant to § 8(1). Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528, 533(1995)(The language of § 8(1) "payments due the employee," means what it says: amounts that are required by an order

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<sup>6</sup> Rizzo, supra.

or decision to be paid directly to the employee.)

Here, the insurer does not dispute that reimbursement was due, nor does it argue that timely payment was made. Instead, its only defense is the employee's failure to comply with the procedural requirements set forth in 452 CMR § 1.07(2)(b) for claiming a penalty pursuant to § 8(1). (Insurer br. 1.)

In Favata, we held that the requirements of this regulation had been effectively met by introduction of the claim form and conference order into evidence, and by testimony that the interest due had not been received on the weekly benefits paid. Here, the claim was admitted and joined for the hearing. The employee introduced into evidence his attorney's cover letter referencing the 110 Claim Form for § 8(1) penalties. (Ex. 5.) The administrative judge took judicial notice of the entire board file, and the conference order of payment was specifically referred to in the hearing decision. (Dec. 2, 7.) The employee testified that he had not received the reimbursement due on his prescribed medications. (Tr. 20.)<sup>7</sup>

Pursuant to our holding in Favata, because the employee testified as to the insurer's failure to reimburse the out-of-pocket payments for the prescription medications ordered at conference, his testimony essentially serves as the required affidavit. The requirements of 452 CMR 1.07(2)(b) were, thus, effectively met. Moreover, we note that the filing requirements of 452 CMR 1.07(2)(b) are just that: requirements for the filing

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<sup>7</sup> The employee testified:

Q: So, again, getting back to the judge's question, those amounts listed on this Exhibit 6, those amounts you have not been reimbursed for, correct?

A: Correct

Q: Okay, but pursuant to the judge's order, have you received any payment for the Pristiq, the Trazadone and the Zolpidem in accordance with this order?

A: None.

(Tr. 20.)

of the claim as prescribed by c. 152 § 7G.<sup>8</sup> The regulation does not affect the claimant's subsequent ability to meet his evidentiary burden of proof at hearing before the trier of fact. Wunschel v. Charter Communications, 29 Mass. Workers' Comp. Rep. 227, 228-229 (2015)(failure of a party to attach appropriate documents to a claim does not disqualify consideration of the claim at hearing).

The insurer posits that the hearing decision denying and dismissing the employee's claim for a § 8(1) penalty is a bar to future claims for the penalty under the doctrine of res judicata. (Insurer br. 5.) However, as we have found the judge erred in failing to award a § 8(1) penalty, the issue is moot.

Finally, the insurer questions whether the judge had jurisdiction to order the unpaid psychiatric medications at the time of the §10A conference. The insurer contends that the prescriptions for Pristiq, Trazadone, and Zolpidem were not part of the employee's claim at the §10A conference, and were added to the conference order without prior notice to the insurer. (Insurer br. 4.) We see no merit in the insurer's argument. The employee's conciliation submissions, received by the Department on November 2, 2015, included a prescription printout from the employee's pharmacy highlighting the medications Pristiq, Zolpidem,<sup>9</sup> and Trazadone as being unreimbursed.<sup>10</sup> Given that the insurer knew about the medications at the conciliation, it had notice of the nature and extent of the employee's claim since that time.

We therefore reverse the decision as to the § 8(1) penalty, and award the maximum of \$10,000.00 to be paid by the insurer to the employee.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate pursuant to § 13A(7) to defray the reasonable costs of counsel. If such a fee is sought, the employee's counsel is directed to submit to this board for review,

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<sup>8</sup> Where, as here, the judge joins such a claim at hearing, the threshold determination as to whether sufficient grounds exist for the joinder has already been made.

<sup>9</sup> This prescription was paid by the insurer directly to the pharmacy from January 14, 2014, through May 14, 2014. From May 2014 forward, the insurer ceased paying the prescription.

<sup>10</sup> Rizzo, supra.

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within thirty days of the date of this decision, a duly executed fee agreement between counsel and the employee setting out either the specific fee agreed to for this appellate work, or an hourly rate, together with an affidavit from counsel as to the hours spent in preparing and presenting this appeal. No fee shall be due and collected from the employee unless and until that fee agreement and affidavit are reviewed and approved by this board.

So ordered.

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Bernard W. Fabricant  
Administrative Law Judge

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Catherine Watson Koziol  
Administrative Law Judge

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William C. Harpin  
Administrative Law Judge

**Filed: March 12, 2019**